

Order

Michigan Supreme Court
Lansing, Michigan

June 30, 2010

Marilyn Kelly,
Chief Justice

ADM File No. 2010-16

Michael F. Cavanagh
Elizabeth A. Weaver
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman
Diane M. Hathaway,
Justices

Proposed Amendments of
Rules 6.302 and 6.610 of the
Michigan Court Rules

On order of the Court, this is to advise that the Court is considering alternative amendments of Rule 6.302 of the Michigan Court Rules and amendment of Rule 6.610 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

ALTERNATIVE A

Rule 6.302 Pleas of Guilty and Nolo Contendere

(A)-(D)[Unchanged.]

(E) Additional Inquiries. On completing the colloquy with the defendant, the court must

(1) ask the prosecutor and the defendant's lawyer whether either is aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with subrules (B)-(D). If it appears to the court that it has failed to comply with subrules (B)-(D), the court may not accept the defendant's plea until the deficiency is corrected.

- (2) if the defendant is not a citizen of the United States, ask the defendant's lawyer and the defendant whether they have discussed the possible risk of deportation that may be caused by the conviction. If it appears to the court that no such discussion has occurred, the court may not accept the defendant's plea until the deficiency is corrected.

(F) [Unchanged.]

ALTERNATIVE B

Rule 6.302 Pleas of Guilty and Nolo Contendere

(A)-(D)[Unchanged.]

(E) Additional Inquiries. On completing the colloquy with the defendant, the court must

- (1) ask the prosecutor and the defendant's lawyer whether either is aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with subrules (B)-(D). If it appears to the court that it has failed to comply with subrules (B)-(D), the court may not accept the defendant's plea until the deficiency is corrected.

- (2) advise the defendant who offers a plea of guilty or nolo contendere that such a plea by a noncitizen may result in deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement.

(F) [Unchanged.]

Rule 6.610 Criminal Procedure Generally

(A)-(D)[Unchanged.]

(E) Pleas of Guilty and Nolo Contendere. Before accepting a plea of guilty or nolo contendere the court shall in all cases comply with this rule.

(1)-(2)[Unchanged.]

- (3) The court shall advise the defendant of the following:

- (a) the mandatory minimum jail sentence, if any, and the maximum possible penalty for the offense,
- (b) a noncitizen defendant who offers a plea of guilty or nolo contendere risks deportation, exclusion from admission to the United States, or denial of naturalization under the laws of the United States. Upon request, the court shall allow the defendant a reasonable amount of additional time to consider the appropriateness of the plea in light of the advisement.
- (~~b~~c) [Relettered but unchanged.]

(4)-(6)[Unchanged.]

- (7) A plea of guilty or nolo contendere in writing is permissible without a personal appearance of the defendant and without support for a finding that defendant is guilty of the offense charged or the offense to which the defendant is pleading if
 - (a) the court decides that the combination of the circumstances and the range of possible sentences makes the situation proper for a plea of guilty or nolo contendere;
 - (b) the defendant acknowledges guilt or nolo contendere, in a writing to be placed in the district court file, and waives in writing the rights enumerated in subrule (3)(~~b~~c); and
 - (c) the court is satisfied that the waiver is voluntary.

(8)-(9)[Unchanged.]

(F)-(H)[Unchanged.]

Staff Comment: These proposals were generated following the recent United States Supreme Court decision in *Padilla v Kentucky*, ___ US ___; 130 S Ct 1473; 176 L Ed 2d 284 (2010), in which the Court held that defense counsel is required to inform a defendant about the risk of deportation as a potential consequence of a guilty plea. In that case, the Court held that “when the deportation consequence is truly clear, as it was in this case,” counsel must give correct advice. The Court also noted that in “situations in which the deportation consequences of a particular plea are unclear or uncertain, ... a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences.” *Padilla*, 130 S Ct 1483.

Proposal A would require a judge to ask a noncitizen defendant and the defendant's lawyer if they have discussed possible risk of deportation as a consequence of a guilty plea. The focus of this inquiry is whether the defendant is a noncitizen, and what the defense counsel has told the defendant. Proposal B would require a judge to give general advice to any defendant (whether or not the defendant is represented by counsel) that a guilty plea by a noncitizen may carry immigration consequences. This alternative would obviate the need to determine the defendant's citizenship status, which the defendant may not know or be willing to divulge.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by October 1, 2010, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-16. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

MARKMAN, J. (*concurring*). It is apparent, at least to this justice, that the only impetus for this proposed change in court rules is the United States Supreme Court's decision in *Padilla v Kentucky*, ___US___;130 S Ct 1473; 176 L Ed 2d 284 (2010). In my view, *Padilla* discovered a new constitutional right that had properly remained undiscovered for the first 220 years of our nation's history, requiring that noncitizen criminal defendants be advised under the Sixth Amendment of the possible deportation consequences of their guilty pleas. That decision is inconsistent with the decisions of this state, *People v Davidovich*, 463 Mich 446 (2000), and will, given the complexity of immigration law, inevitably cause uncertainty as to guilty pleas in cases involving noncitizen criminal defendants, while opening up constitutional arguments that other possible collateral consequences of a guilty plea, to which there are no end, must also be the subject of warning and advice. In the end, I believe that *Padilla* will either require that more favorable plea agreements be offered to such defendants, or that more prosecutorial resources be devoted to such cases in proceeding to trial. Although this Court is obligated to accommodate *Padilla*, I moved at administrative conference to publish Proposal A, offered by Mr. Baughman of the Wayne County Prosecutor's Office, because I believe his proposal is more closely in accord with this decision than Proposal B, in: (a) limiting the new inquiry required of the trial court to noncitizens, as opposed to requiring such inquiry to be made of all criminal defendants, thus avoiding an enormous waste of time and resources; (b) limiting the inquiry specifically to the deportation consequences of a guilty plea, which was the only issue before the Court in *Padilla*, rather than expanding this inquiry to encompass other collateral matters, such as the "exclusion of admission" and "naturalization;" and (c) preserving the focus upon the

lawyer's duty to properly advise the client in light of the client's particular circumstances, rather than imposing an equivalent duty upon the trial court itself. While this Court is obligated to abide by *Padilla*, it is not obligated to afford new rights that go beyond that decision, and beyond the requirements of the Constitution, and I would not do so.

CORRIGAN, J., concurs with MARKMAN, J.



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 30, 2010

Corbin R. Davis

Clerk